IN THE SUPREME COURT OF MISSOURI

SC92675

TARA WARD, et al., PLAINTIFFS/APPELLANTS,

v.

WEST COUNTY MOTOR COMPANY, d/b/a
WEST COUNTY BMW, DEFENDANT/RESPONDENT

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL CIRCUIT COURT,
ST. LOUIS COUNTY, MISSOURI
THE HONORABLE RICHARD C. BRESNAHAN, JUDGE

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

Plaintiffs are six individuals who transacted business with West County BMW between April 30, 2005 and June 3, 2006. Each of the Plaintiffs paid a deposit ranging from $500.00 to $1,000.00 toward the purchase of an automobile. None of the Plaintiffs took delivery of an automobile nor received a signed retail installment contract from West County. For various reasons, Plaintiffs chose not to go forward with the purchase and requested a refund of their deposits. West County refused to refund Plaintiffs' deposits, which prompted this litigation.

Plaintiffs filed suit under the Missouri Merchandising Practices Act ("MPA") to recover their deposits. The trial court dismissed Plaintiffs' MPA claim for failure to state a claim. Plaintiffs filed a timely notice of appeal with the Missouri Court of Appeals, Eastern District. The Court of Appeals affirmed the trial court's Judgment.

On July 5, 2012, Plaintiffs filed their application for transfer with this Court because the questions involved are of general interest and importance, and because the Opinion of the Eastern District of the Missouri Court of Appeals is contrary to previous decisions of appellate courts of this state, and contrary to previous decisions of this Court. On August 14, 2012, this Court sustained Plaintiffs' application for transfer. Because the Court sustained Plaintiffs' application for transfer pursuant to Rule 83.04 of the Supreme Court Rules, the Court has jurisdiction over this case pursuant to Art. V, Sec. 10 of the Missouri Constitution.

STATEMENT OF FACTS

A. Introduction

This lawsuit was initially filed as a class action by five individual plaintiffs, Tara Ward ("Ward"), Kamal Yassin ("Yassin"), Matthew Toole ("Toole"), Curt Zargan ("Zargan") and Larry LaBarge ("LaBarge") (hereinafter jointly referred to as "Plaintiffs"), against West County Motor Company, d/b/a West County BMW (hereinafter "West County"). Plaintiffs alleged that West County violated the Missouri Merchandising Practices Act ("MPA") and was liable for common law conversion as a result of failing to refund deposits that were paid toward the purchase of an automobile. The MPA claim against West County alleged that West County:

a. Converted funds paid by plaintiffs when it failed to apply them to the purchase or lease of a motor vehicle;

b. Failed to act in good faith when it refused to make like-kind refunds of deposits after the sale or lease had been terminated, and before plaintiffs had taken delivery of a motor vehicle;

c. Used a liquidated damages clause that was really a disguised penalty provision; and

d. Violated § 365.070.4 by failing to refund plaintiffs' deposits after the transactions were rescinded. (L.F. at 56).

On January 19, 2011, Plaintiffs voluntarily withdrew their class claim and proceeded individually. On July 19, 2011, Plaintiffs filed a second amended petition adding Plaintiff, Mona Yassin as the sixth Plaintiff, without making any substantive changes to

the previous petition. (L.F. at 50). West County filed a motion to dismiss the MPA claim, (L.F. at 73), and the trial court granted the motion with prejudice. (L.F. at 110). Plaintiffs subsequently dismissed the conversion claim without prejudice and filed a timely notice of appeal. (L.F. at 112). The issue on appeal is whether Count I of Plaintiffs second amended petition states a claim under the MPA.

The pertinent facts with respect to each Plaintiff are as follows:

B. Tara Ward

On June 3, 2006, Ward visited the West County dealership located at 14417 Manchester Road in Manchester, Missouri, with the possible intention of purchasing a car. (L.F. at 51). Ward became interested in a BMW X5, and signed a Vehicle Buyer's Order with West County. (L.F. at 14). Ward was handled by West County's sales representative, Tim Everhart. Everhart told Ward she had to put down a $1,000.00 deposit, and that she could keep the X5 overnight for a test drive and bring it back the next day. (L.F. at 14). Ward was told the deposit would be refunded when she returned the X5 to the dealership. (L.F. at 14). Ward filled out a credit application and paid a $1,000.00 deposit to West County. (L.F. at 14).

Ward took the X5 back to West County the following day (a Sunday) and dropped off the keys. (L.F. at 14). Ward chose not to purchase the X5 and asked for a refund of her deposit. (L.F. at 14). Ward was told by the manager that the contract was final and he refused to refund her deposit. (L.F. at 15). Ward never took delivery of the X5, and never received a signed retail installment contract from West County. (L.F. at 15).

C. Kamal and Mona Yassin

On April 30, 2005, Kamal Yassin visited the West County dealership located at 14417 Manchester Road in Manchester, Missouri, with the possible intention of purchasing a car for his son. (L.F. at 52). Yassin became interested in a brand new 2004 BMW M3, and signed a Vehicle Buyer's Order with West County. (L.F. at 16). Yassin intended to pay cash for the M3, but wanted to check with his son first before proceeding with the purchase. (L.F. at 52). Yassin dealt with West County's sales representative, Brad Taylor. (L.F. at 52). Taylor told Yassin he had to put down a $1,000.00 deposit to secure the M3. (L.F. at 16). Taylor told Yassin that West County would hold onto the check until Yassin confirmed his son wanted the vehicle. (L.F. at 16). Taylor assured Yassin the check would be returned if Yassin did not go through with the purchase. (L.F. at 16).

Yassin was not able to persuade his son to take the M3. (L.F. at 16). Yassin then requested Taylor to return his check, and Taylor said he would put it in the mail. (L.F. at 16). A month later, Yassin called the dealership because he never received the check. (L.F. at 16). Yassin was told the check was being processed. (L.F. at 17). The following day, West County cashed the check.

Yassin personally went to the dealership and spoke to the manager, Orson Guyton. (L.F. at 17). Yassin told Guyton that Taylor had promised the check would be returned if Yassin's son chose not to take the M3. (L.F. at 16). Guyton became angry and started yelling at Yassin, and told him to leave and not come back. (L.F. at 17, 52). Guyton refused to refund Yassin's deposit. (L.F. at 17). Yassin never took delivery of the M3 and never received a refund of his deposit from West County. (L.F. at 17).

D. Matthew Toole

On January 25, 2006, Toole visited the West County dealership located at 14417 Manchester Road in Manchester, Missouri, with the possible intention of purchasing a car. (L.F. at 53). Toole became interested in a used 2003 BMW 330 Coupe, and signed a Vehicle Buyer's Order with West County. (L.F. at 18). Toole was handled by West County's sales representative, "Sean." (L.F. at 18). Toole told Sean he could not afford to pay more than $450 per month in car payments. (L.F. at 18). Sean told Toole he would need to put down a $500 deposit before West County could begin to look for financing. (L.F. at 18). Sean told Toole the $500 deposit would be refunded if West County could not get him financed at $450 per month. (L.F. at 18). Toole paid a $500.00 deposit to West County and filled out a credit application. (L.F. at 18).

Approximately two days later, Sean told Toole the lowest payment he could get was $650.00 per month. (L.F. at 18). Toole requested a refund of his deposit, but West County refused. (L.F. at 19). Toole told one of the managers that Sean had promised the deposit was refundable; however, the manager told Toole the contract was final and he could not get a refund. (L.F. at 19). Toole never took delivery of the 330 Coupe and never received a signed retail installment contract from West County. (L.F. at 19).

E. Curt Zargan

On January 28, 2006, Zargan visited the West County dealership located at 14417 Manchester Road in Manchester, Missouri, with the possible intention of purchasing a car. (L.F. at 53). Zargan was looking for a specific vehicle, a 2006 BMW 325i sedan,

which West County did not have in stock. (L.F. at 20). Zargan's salesman, Tim Everhart, told Zargan he was able to locate the exact vehicle Zargan was looking for and that it was en route from Germany. (L.F. at 20). Everhart said the vehicle would arrive in two weeks. (L.F. at 20). Everhart told Zargan he would need to put down a $1,000 deposit in order to insure the vehicle was delivered to the dealership. (L.F. at 20). Zargan paid a $1,000.00 deposit and told Everhart he would fill out a credit application once the vehicle arrived at the dealership. (L.F. at 20).

Two weeks later, Zargan's wife called West County and spoke to Texann McBride, one of West County's managers. (L.F. at 20). McBride said the vehicle was not en route from Germany, and had not even left the assembly line. (L.F. at 21). McBride said Everhart had lied about the status of the vehicle, and that West County had disciplined Everhart as a result. (L.F. at 21). On February 27, 2006, Zargan terminated the deal with West County and requested a refund of his deposit. (L.F. at 21). McBride and Orson Guyton, another manager, told Zargan they were not authorized to give him a refund and refused. (L.F. at 21). Zargan never took delivery of the 325i and never received a signed retail installment contract from West County. (L.F. at 21).

F. Larry LaBarge

On April 17, 2006, LaBarge conducted an internet search for a 2006 BMW 325i with a manual transmission. (L.F. at 22). LaBarge filled out an on-line form and received a telephone call from Tim Everhart, West County's sales representative, a few hours later. (L.F. at 22). Everhart said he was able to locate the exact vehicle LaBarge was looking

for, that it was in the process of being loaded onto a boat in Germany and was heading for the United States. (L.F. at 22). Everhart told LaBarge he would need to pay a $1,000.00 deposit to insure delivery of the 325i to West County, but that the money was fully refundable for any reason. (L.F. at 22).

Everhart faxed a Vehicle Buyers Order and credit application to LaBarge. (L.F. at 22). LaBarge filled out these documents and faxed them back, and also paid a $1,000.00 deposit over the phone using his credit card. (L.F. at 22). Everhart gave LaBarge a production number so he could track the progress of the vehicle. (L.F. at 23). LaBarge used the production number to locate the vehicle, but learned the vehicle was not yet in production. (L.F. at 23).

Two or three weeks later, LaBarge learned the vehicle had just started production. (L.F. at 23). LaBarge called Everhart to cancel the deal, and requested a refund of his deposit. (L.F. at 23). Everhart said the deposit was non-refundable and that LaBarge would have to speak with his manager, Orson Guyton. (L.F. at 23). LaBarge told Guyton that Everhart had promised the deposit was refundable. (L.F. at 23). Guyton said the contract was final and LaBarge could not get his money back. (L.F. at 23). LaBarge never took delivery of a vehicle and never received a signed retail installment contract from West County. (L.F. at 23).

POINTS RELIED ON

I. THE TRIAL COURT ERRED WHEN IT DISMISSED COUNT I OF PLAINTIFFS' SECOND AMENDED PETITION BECAUSE (1) CLAIMS OF CONVERSION, LACK OF GOOD FAITH AND UNLAWFUL LIQUIDATED DAMAGES ARE "UNFAIR PRACTICES" WHICH STATE CLAIMS UNDER THE MPA; AND (2) WEST COUNTY'S LIQUIDATED DAMAGES PROVISIONS ARE NOT DESIGNED TO ASCERTAIN FUTURE DAMAGES BUT RATHER ARE INTENDED TO KEEP CONSUMERS FROM CANCELLING THEIR CONTRACTS AND ARE UNLAWFUL PENALTIES AS A MATTER OF LAW

State v. Shaw, 847 S.W.2d 768 (Mo. 1993)

AAA Uniform and Linen Supply, Inc. v. Barefoot, Inc., 81 S.W.3d 133, 138 (Mo. App. W.D. 2002)

Valentine's, Inc. v. Ngo, 251 S.W.3d 352, 354 (Mo. App. S.D. 2008)

City of Richmond Heights v. Waite, 280 S.W.3d 770 (Mo. App. E.D. 2009)

§ 365.070.4

15 CSR § 60-8.020

Restatement (Second) of Contracts § 356(1)

II. THE TRIAL COURT ERRED WHEN IT DISMISSED THE CLAIMS BROUGHT BY WARD, TOOLE, ZARGAN AND LABARGE UNDER § 365.070.4 BECAUSE THESE PLAINTIFFS (1) NEVER RECEIVED DELIVERY OF A MOTOR VEHICLE, (2) NEVER RECEIVED A SIGNED RETAIL INSTALLMENT CONTRACT, AND (3) CONTEMPLATED SIGNING A RETAIL INSTALLMENT CONTRACT, THEREBY SATISFYING EACH ELEMENT OF THE STATUTE

§ 365.070.4

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DISMISSED COUNT I OF PLAINTIFFS' SECOND AMENDED PETITION BECAUSE (1) CLAIMS OF CONVERSION, LACK OF GOOD FAITH AND UNLAWFUL LIQUIDATED DAMAGES ARE "UNFAIR PRACTICES" WHICH STATE CLAIMS UNDER THE MPA; AND (2) WEST COUNTY'S LIQUIDATED DAMAGES PROVISIONS ARE NOT DESIGNED TO ASCERTAIN FUTURE DAMAGES BUT RATHER ARE INTENDED TO KEEP CONSUMERS FROM CANCELLING THEIR CONTRACTS AND ARE UNLAWFUL PENALTIES AS A MATTER OF LAW

A. Standard of Review

The standard of review for a trial court's grant of a motion to dismiss is de novo. *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 315 (Mo.App. W.D. 2011), citing *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). A motion to dismiss for failure to

state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. *Coons v. Berry*, 304 S.W.3d 215, 217 (Mo.App. W.D. 2009). No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Id*. at 217.

When a trial court grants a motion to dismiss without explicitly stating the reasons for dismissal, the reviewing court must assume the trial court acted for reasons offered in the motion to dismiss. *Citizens for Preservation of Buehler Park v. City of Rolla*, 187 S.W.3d 359, 361 (Mo.App. S.D. 2006); *Molasky v. Brown*, 720 S.W.2d 412, 414 (Mo.App. W.D. 1986. If the motion merely states the general ground of "failure to state a cause of action," the reviewing court should look at the facts and the reasonable inferences therefrom most favorably from plaintiffs' standpoint, to see if any ground for relief can be made out from the pleadings. *Young v. Lucas Const. Co.*, 454 S.W.2d 638, 641 (Mo.App. 1970).

Here, the trial court did not give a reason for granting West County's motion to dismiss. (L.F. at 110). Moreover, West County's motion to dismiss was directed solely to Plaintiffs' claim under § 365.070.4 (L.F. at 73), and made no direct or indirect mention of the claims alleged in paragraph 46(a)-(c) of the second amended petition. (L.F. at 56). Thus, Plaintiffs are entitled to the most favorable review of the facts and inferences therefrom with respect to these latter claims. *Young*, 454 S.W.2d at 641.

B. Plaintiffs Pled Every Element of an MPA Claim

Each Plaintiff alleged that he/she purchased merchandise (automobiles) for personal, family or household purposes, and suffered an ascertainable loss of money (deposits) as a result of an act declared unlawful by § 407.020. (L.F. at 55-57). Section 407.020 declares nine separate acts to be "unlawful," these are: (1) deception, (2) fraud, (3) false pretense, (4) false promise, (5) misrepresentation, (6) unfair practice, and the (7) concealment, (8) suppression, and (9) omission of a material fact. Here, Plaintiffs alleged that West County (a) converted their funds, (b) failed to act in good faith, (c) used an unlawful liquidated damages clause in its contract, and (d) (*with the exception of Kamal and Mona Yassin*) violated § 365.070.4. (L.F. at 56). Thus, Plaintiffs will have stated a claim under the MPA if (1) conversion, (2) lack of good faith, (3) unlawful liquidated damages, and/or (4) violating § 365.070.4 fall within one of the nine "unlawful acts" listed in § 407.020.

In 15 CSR § 60-8.020, the Missouri Attorney General defined "unfair practice" as:

> (1) [A]ny practice which –
>
> (A) Either –
>
> 1. Offends any public policy as it has been established by the Constitution, *statutes* or *common law* of this state, or by the Federal Trade Commission, or its interpretive decisions; or
>
> 2. Is unethical, oppressive or unscrupulous; and
>
> (B) Presents a risk of, or causes, substantial injury to consumers (emphasis added).

Here, conversion and unlawful liquidated damages are common law claims. Section 365.070.4 is a statutory claim. Plaintiffs' claim of lack of good faith arises from 15 CSR § 60-8.040 which states: "It is an unfair practice for any person in connection with the advertisement or sale of merchandise to violate the duty of good faith in solicitation, negotiation and performance, or in any manner fail to act in good faith."[1] By including "unfair practice" in the list of unlawful acts, the legislature made it clear that it intended to prohibit conduct that extended well beyond the customary reach of common law fraud. *State v. Shaw*, 847 S.W.2d 768, 776 (Mo. 1993). Thus, Plaintiffs' allegations of conversion, lack of good faith, unlawful liquidated damages and the violation of § 365.070.4 all constitute unlawful acts, since each is a separate "unfair practice" within the meaning of § 407.020.

Plaintiffs alleged these four separate violations of the MPA in a single count (i.e., count I) of their second amended petition. This manner of pleading is permitted by Rule 55.10, which allows a party to plead alternative claims "in one count . . . or in separate counts . . ." See also, *Wills v. Whitlock*, 139 S.W.3d 643, 659 FN18 (Mo.App. W.D. 2004) ("A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds"). Thus, as long as any one of Plaintiffs' claims stated a claim under the MPA, it should never have been dismissed, even if all of the remaining claims failed to state a claim.

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[1] "Good faith" is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." 15 CSR § 60-8.010(E).

C. West County Was Granted Greater Relief by the Trial Court than Requested, and is Now Unable to Make a Credible Argument as to Why the Trial Court Granted the Unrequested Relief

In filing its motion to dismiss, West County focused exclusively on Plaintiffs' claim under § 365.070.4. (L.F. at 73). West County did not mention or even allude to Plaintiffs' claims of conversion, lack of good faith or unlawful liquidated damages anywhere in its motion. However, the title of the motion requested the dismissal of "count I" in its entirety, without signaling that the substance of the motion was much narrower in scope. Thus, the title made it appear as if West County was seeking a dismissal of the entire MPA claim, while the substance of the motion confirmed that West County was only seeking a dismissal of the § 365.070.4 claim. Therefore, it appears as though the trial court granted the motion based on its title as opposed to its substance, which resulted in a windfall to West County.

West County now tries to justify the dismissal of the conversion, lack of good faith and unlawful liquidated damages claims by making the untenable argument that these claims are "premised" on the § 365.070 claim. (Resp. Br. at 21). This argument is baseless and filled with flaws. Section 365.070.4 applies to instances where a motor vehicle seller refuses to refund a deposit after the buyer rescinds. However, in order for West County's argument to make sense, § 365.070.4 would have to be the *exclusive* remedy. This is so because no other claim could survive a motion to dismiss without first satisfying the elements of § 365.070.4. In other words, § 365.070.4 would become an

element of conversion, lack of good faith and unlawful liquidated damages, which would render these claims superfluous and redundant. Nothing in the statute, however, indicates a legislative intent to make § 365.070.4 the "exclusive" remedy, and no other authority supports such a position.

D. West County's Argument is Weakened by the Fact That Two of the Plaintiffs' Had No Claim Under § 365.070.4, Yet Their Claims Were Dismissed Anyway

The starkest proof that Plaintiffs' conversion, lack of good faith and unlawful liquidated damages claims could not possibly have been premised on § 365.070.4 is the fact that Kamal and Mona Yassin intended to pay cash for their vehicle. According to § 365.070.4, a seller is only required to refund a deposit if the deposit is paid "on account of or in contemplation of" a retail installment contract. Here, since the Yassins intended to pay cash, they obviously never "contemplated" signing a retail installment contract. Therefore, the Yassins' conversion, lack of good faith and unlawful liquidated damages claims could not possibly have been premised on § 365.070 because that statute does not apply to them.

Ultimately, this means the Yassins' claims were dismissed for some other reason. Plaintiffs have no idea what this reason is, and West County has never explained it. However, assuming a valid reason does exist, it would also explain why the identical claims of Ward, Toole, Zargan and LaBarge were dismissed as well. In other words, if the dismissal of the Yassins' claims was not premised on § 365.070.4, then neither was the dismissal of the Ward, Toole, Zargan and LaBarge claims.

E. The MPA Does Not Limit the Number of Common Law and Statutory Violations That Can Form the Basis of an MPA Claim

West County's argument also contradicts 15 CSR § 60-8.020, which defines "unfair practice" as the violation of a statute or common law which offends any public policy. Assuming the regulation means the violation of *any* statute or *any* common law (which is the only reasonable interpretation), it would not matter how many separate violations were involved. To find otherwise would lead to an absurd result. For example, as applied to these facts, a finding that § 365.070.4 was the only available remedy would necessarily mean that West County could *lawfully* (1) convert Plaintiffs' deposits, (2) act in bad faith, and (3) demand unlawful liquidated damages, as long as it did not violate § 365.070.4. Clearly, the legislature intended for all such violations to be actionable under the MPA, as long as they occur within a consumer transaction.

F. This Court Should Find, as a Matter of Law, That West County's Liquidated Damages Clause is an Unlawful Penalty

West County's Vehicle Buyer's Order ("VBO") states on the front "ALL DEPOSITS ARE NON REFUNDABLE" and further states on the back:

> Unless this Order shall have been cancelled by Purchaser under and in accordance with the provisions of paragraph 2 or 3 above, Dealer shall have the right, upon failure or refusal of Purchaser to accept delivery of the motor vehicle ordered hereunder and to comply with the terms of this Order, to retain as liquidated

> damages any cash deposit made by Purchaser, and in the event a used motor vehicle has been traded in as a part of the consideration for the motor vehicle ordered hereunder, to sell such used motor vehicle and reimburse himself out of the proceeds of such sale for the expenses specified in paragraph 2 above and for such other expenses and losses as Dealer may incur or suffer as a result of such failure or refusal by Purchaser (emphasis added). (L.F. at 40 – 41).

Whether or not these provisions are valid, or whether they constitute a demand for unlawful liquidated damages, is a question of law. *Robert Blond Meat Co. v. Eisenberg*, 273 S.W.2d 297, 299 (Mo. 1954). The fact that the parties may have designated the money to be paid as "liquidated damages" is neither controlling nor conclusive. *Id*. at 299. Such contracts may be, and often are, held to provide for a penalty. *Id*. at 299.

In Missouri, liquidated damages provisions are typically used in real estate and construction contracts. See e.g., *AAA Uniform and Linen Supply, Inc. v. Barefoot, Inc.*, 81 S.W.3d 133, 138 (Mo. App. W.D. 2002); and *Valentine's, Inc. v. Ngo*, 251 S.W.3d 352, 354 (Mo. App. S.D. 2008). Courts will enforce liquidated damages provisions in these instances because of the difficulty of ascertaining actual damages. For example, where the construction of a building is delayed or real estate is taken off the market, it is "virtually impossible" to calculate actual damages. *AAA Uniform and Linen Supply, Inc.*, 81 S.W.3d 133 at 138.

By contrast, liquidated damages may not be used to compel performance of, or keep a party from cancelling, a contract. *City of Richmond Heights v. Waite*, 280 S.W.3d 770, 776 (Mo. App. E.D. 2009); *AAA Uniform and Linen Supply, Inc.*, supra, at 138. Here, West County improperly demanded liquidated damages to keep customers from looking elsewhere for an automobile. West County admitted it included the phrase "all deposits are nonrefundable" so that customers would realize they were signing a "serious contract."[2] In other words, the language was designed to punish customers for cancelling their contract, and had nothing to do with any difficulty of ascertaining damages.

Missouri has adopted the Restatement (Second) of Contracts § 356(1) with respect to liquidated damages. *Valentine's, Inc. v. Ngo*, 251 S.W.3d 352, 354 (Mo. App. S.D. 2008). For a liquidated damages clause to be valid: (1) the amount fixed as damages must be a reasonable forecast for the harm caused by the breach; and (2) the harm must be of a kind difficult to accurately estimate. *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878, 881 (Mo. App. E.D. 1994), citing *Grand Bissell Towers v. Joan Gagnon Ent.*, 657 S.W.2d 378, 379 (Mo. App. 1983). Here, West County could easily have ascertained its damages by consulting the Uniform Commercial Code. Pursuant to § 400.2-708 RSMo, ". . . the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price . . ." Applying this formula, West County's damages for each vehicle

[2] See the relevant deposition testimony of Raymond Noones, West County's general manager, at A-7, 8.

would be the difference between the fair market value and the contract price on the date of sale.

Since damages are relatively easy to measure in a car sales transaction, West County had no legitimate need for a liquidated damages clause. This Court should thus find as a matter of law that West County's liquidated damages clause is an unlawful *penalty*.

II. THE TRIAL COURT ERRED WHEN IT DISMISSED THE CLAIMS BROUGHT BY WARD, TOOLE, ZARGAN AND LABARGE UNDER § 365.070.4 BECAUSE THESE PLAINTIFFS (1) NEVER RECEIVED DELIVERY OF A MOTOR VEHICLE, (2) NEVER RECEIVED A SIGNED RETAIL INSTALLMENT CONTRACT, AND (3) CONTEMPLATED SIGNING A RETAIL INSTALLMENT CONTRACT, THEREBY SATISFYING EACH ELEMENT OF THE STATUTE

A. Standard of Review

The construction of a statute is a question of law, which the appellate court reviews de novo. *Dorris v. Kohl*, 337 S.W.3d 107, 110 (Mo.App. W.D. 2011). Here, the trial court construed § 365.070.4 RSMo to preclude a claim by Plaintiffs under the MPA because Plaintiffs failed to sign a retail installment contract prior to rescinding their transaction. Plaintiffs contend the trial court misconstrued the statute, in that requiring Plaintiffs to sign a retail installment contract as a condition of their right to rescind would undermine the purpose of the statute and would make it impossible for Plaintiffs, or anyone else, to obtain a refund of their deposits. Point II presents a matter of first impression.

B. Argument

Nowhere in § 365.070.4 does it state that a buyer has to sign a retail installment contract as a condition of receiving a refund. To the contrary, the statute specifically permits a buyer to receive a refund if the money is paid "on account of or in contemplation of" a [retail installment] contract. Here, four of the Plaintiffs, Ward, Toole, Zargan and LaBarge, either signed or intended to sign a credit application.[3] As a result, these Plaintiffs contemplated signing a retail installment contract and were thus entitled to recover their deposits under the statute.

Section 365.070.4 states in pertinent part:

> The seller shall deliver to the buyer, or mail to him at his address shown on the contract, a copy of the contract signed by the seller. Until the seller does so, a buyer who has not received delivery of the motor vehicle may rescind his agreement and receive a refund of all payments made and return of all goods traded in to the seller on account of or in contemplation of the contract, or if the goods cannot be returned, the value thereof (emphasis added).

The statute thus gives a limited right to motor vehicle buyers to rescind the sale and receive a refund of all monies or property paid. This right arises where (1) the seller has not yet delivered a copy of the [retail installment] contract signed by the seller, (2) the buyer has not received delivery of a motor vehicle, and (3) the payment was made "on

[3] This fact has been admitted by West County. (L.F. at 88).

account of or in contemplation of the [retail installment] contract." The word "contract" is synonymous with the phrase "retail installment contract," and means:

> "[A]n agreement evidencing a retail installment transaction entered into in this state pursuant to which the title to or a lien upon the motor vehicle, which is the subject matter of the retail installment transaction is retained or taken by the seller from the buyer as security for the buyer's obligation. The term includes a chattel mortgage or a conditional sales contract." § 365.020(10).

There is no dispute that West County [the "seller"] never delivered a signed copy of a retail installment contract to any Plaintiff [the "buyers"].[4] Until it did, Plaintiffs had the

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[4] Plaintiffs recognize that the definition of "seller" and "buyer" in § 365.020 suggests that the seller/buyer has already executed a retail installment contract. However, the statute also provides "*[u]nless clearly indicated by the context, the following words and phrases have the meaning indicated* . . ." Thus, the Court must also consider the *context* in which the words "buyer" and "seller" are used, not simply the statutory definition.

Within the *context* of § 365.070.4, "buyer" cannot mean someone who has already signed a retail installment contract, otherwise, the phrase "in contemplation of" would be rendered meaningless. A similar example is evident in § 365.070.1, which states the retail installment contract "shall be completed as to all essential provisions prior to the signing of the contract by *the buyer*" (emphasis added).

right to rescind, as long as they never received delivery of a motor vehicle. Thereafter, upon rescinding, Plaintiffs had the right to receive a refund of all payments made on account of or in contemplation of a [retail installment] contract.

West County makes the untenable argument that Plaintiffs first had to sign a retail installment contract before they could exercise their right to rescind. (L.F. at 74). West County arrives at its erroneous interpretation by considering the words "contract" and "agreement" to be interchangeable. (L.F. at 76). This cannot be the case, however. The plain language of the statute states that until the seller delivers a signed copy of the [retail installment] contract to the buyer, the buyer "may rescind his *agreement*." Thus, if a buyer can rescind his agreement up to the point where he or she receives a signed copy of the [retail installment] contract, then the "agreement" necessarily pre-dates the "contract." The legislature clearly envisioned two separate transactions when it enacted § 365.070.4.

The "agreement" in this instance is the Vehicle Buyer's Order ("VBO"), which each Plaintiff executed at the time he/she paid a deposit (See e.g., L.F. at 40). While the statute entitled *every* Plaintiff to rescind the VBO (including the Yassins), only Ward, Toole, Zargan and LaBarge were entitled to recover their deposits. This is so because Ward, Toole, Zargan and LaBarge intended to finance their purchases and, as a result, paid their

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Obviously, the statutory definition of "buyer" in each instance does not fit the context, since a buyer who is waiting to sign (or who contemplates signing) a retail installment contract cannot possibly have already signed it.

deposits "in contemplation of" a retail installment contract. By contrast, the Yassins intended to pay cash for their vehicle and did not pay their deposit "in contemplation of" a retail installment contract. The Yassins, therefore, must look to some other legal theory to recover their deposit.

Plaintiffs' interpretation of § 365.070.4 is consistent with the plain language of the statute, and fulfills the legislature's objective of insuring that consumers who change their mind about purchasing a vehicle can easily recover their deposits. By contrast, West County's interpretation tortures the plain language and eradicates any meaningful application of the statute.

For example, under West County's interpretation, buyers who fail to qualify for financing will be ineligible for a refund because they will never have signed a retail installment contract, even though they contemplated signing one at the time they paid their deposit. Additionally, buyers who have already decided to rescind will have to take the formulaic step of signing a retail installment contract, which means finalizing the transaction, just so they can immediately terminate it. Realistically speaking, no sane buyer would ever sign a retail installment contract when he or she intended to rescind. Signing a retail installment contract would give the seller irrefutable proof of a completed sale. A seller could then assign the retail installment contract to a finance company, which it would not have been able to do without a signature. Hence, requiring buyers to sign a retail installment contract as a condition of recovering their deposits will insure that no buyer will *ever* recover a deposit under the statute.

CONCLUSION

Plaintiffs respectfully ask the Court to reverse the trial court's Order and Judgment of September 14, 2011 and remand the case for further proceedings consistent with the Court's Opinion. Specifically, Plaintiffs are asking the Court to find that:

1. Plaintiffs' allegations of conversion, lack of good faith and unlawful liquidated damages state claims under the MPA;
2. West County violated § 365.070.4 with respect to Ward, Toole, Zargan and LaBarge, and that these Plaintiffs stated claims under the MPA by alleging a violation of this statute; and
3. West County's liquidated damages clauses are unlawful penalty provisions as a matter of law.

Respectfully Submitted,

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CERTIFICATION

The undersigned certifies that on this 11th day of September 2012, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following: Bryan M. Kaemmerer, Attorney for Defendant, 400 South Woods Mill Road, Suite 250, Chesterfield, Missouri 63017.

The undersigned further certifies this Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains a total of 6,435 words.

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